NO. 19509

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CLYDE AMSLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of California
Central Division

APPELLANT JOSEPH C. AMSLER'S REPLY BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CONSTITUTION

STATUTES

RULES

NO. 19509

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DELAYS IN OBTAINING RECORD

The appellee has made much of the delay in getting this appeal before this Court. Its argument is a plain demonstration on why it was never the intent of the makers of the Constitution, or even of Congress, that a foreign judge, to-wit: an Oregon judge and his Oregon entourage, his court reporter, his bailiff, his clerk and his secretary, should move over 1000 miles into Los Angeles and take over.

The delays which thus resulted in trying to get a record together are evidence that such situation should not have existed. Constantly we were faced with efforts to get a true and correct record which is the constitutional right and without which a defendant is deprived of due process of law guaranteed equally by the Fifth and Fourteenth Amendments. (Chessman v. Teets, 354 US 156, 1 L.ed.2d 1253)

As said in the Chessman case, at 1 L.ed.2d 1259-60:

> "Without blinking the fact that the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice, we cannot allow that circumstance to deter us from withholding relief so clearly called for. On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how

late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

Thus we are grateful to the government counsel for calling attention to much needed requests for extensions of time, each based upon an effort to get a completed record of the case, at least insofar as we could do so. Our inability to see and confer with the reporter or the judge, who were many miles away, was certainly not the intention of the framers of our Constitution. Thus it is, as stated in Chessman v. Teets, supra, "the Constitution of the United States" that is the proponent before the Court, in this case.

THE TRIAL JUDGE WAS UNAUTHORIZED TO SIT IN THIS DISTRICT

This Court can take judicial notice of the fact that

judges of the District Court are appointed by the President of the United States for a specific District following a recommendation by the Senators of that state as a party in power. If those Senators happen to be of an opposite party, the patronage can go to the congressional delegation of the particular state. The judge who is appointed is necessarily a lawyer of the state and District where his appointment takes place. He is not a non-member of the State Bar of the state of his appointment and possibly a member of the Bar of some other state.

Section 2, Article 3 of the Constitution of the United States provides:

> "Trial of Crimes.
>
> "3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where said crime shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed."

It is implicit in this Section that the word "trial" encompasses the court, the jury and all parties participating in such a trial to be in the state and District.

While the appellee says there have been no cases regarding the same, it is interesting that among the com-

plaints in the Declaration of Independence, adopted in Congress July 2, and signed July 4, 1776, that one was "For transporting us beyond seas to be tried for pretended offenses" and "He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation".

The government has cited the case of McDowell v. U.S., 159 US 596, 598, an 1895 case. This involved the vacancy of a judicial place from January 1st to February 12th and the question arose as to whether the court could fill the vacancy from another District and it was held that it could do so.

In Lamar v. U.S., 241 US 103, a 1916 case, the question was raised as to whether a Michigan judge could sit in a New York case or whether this usurped the function of the President of the United States.

Neither of the above cases raised the question under Section 2, Article 3 of the original Constitution of the United States establishing the judiciary for the trial of criminal cases whether the court had to be a court in the state and District where the crime was committed. We respectfully contend that neither of these cases reaches this point nor has it ever been decided and we contend that insofar as the statute of Congress is concerned

insofar as it covers criminal cases, it violates Article 3, Section 2 of the Constitution of the United States.

The article by Judge Yankwich in 3 FRD 481 merely discussed shifting judges around and using judges in various Districts which, of course, gives federal judges a nice trip and possibly, at times, a vacation, but its purpose was not meant for that and it certainly is not intended to cover criminal cases where the life and liberty of defendants is at stake.

We submit, also, that even assuming that a judge might be appointed or designated to relieve in congested Districts rather than to supplant a vacancy or an emergency situation, no such condition was shown to have existed in Los Angeles where the case was sent to the Master Calendar judge of the Criminal Division. There was no showing that local judges would not or were not available to try the case and the procedure in getting an out of town judge on the morning of the day of the arraignment and shoving the case over to him was something that we respectfully submit violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and Section 2 of Article 3 of the Constitution.

Insofar as McDowell v. U.S., supra, and Lamar v. U.S., supra, may be construed to hold any such authority, we respectfully ask a re-examination of these cases in the

light of the constitutional provisions and statutory purpose and the power of appointment of the President and the confirmation by the Senate in a particular District by a particular Senator.

We submit that this question is of great importance in the administration of criminal justice which has not been but should be passed upon now by this Honorable Court.

ADMINISTERING OF OATHS TO THE JURY

The Oregon clerk was not authorized in California to administer oaths at the time the oaths were administered to the prospective jurors.

The appellee says: "This Court should note the fact that the trial judge, out of an abundance of caution, himself administered the oath to the jury". However, this was after the jury had been selected and this is a confession that even the trial judge thought, out of an abundance of caution, that there had been error by having a non-clerk, virtually a layman, purportedly swear prospective jurors who were supposedly question, not under oath.

Appellee fails to mention that it was the Oregon clerk who administered the purported oath to the prospective jurors and that this whole procedure was a nullity

as if it had been conducted in the street or at the state courthouse or some other place where there was no court actually organized or in session.

The whole procedure, therefore, was a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

ASSIGNMENT AND TRANSFER OF JUDGES

We respectfully submit that insofar as Title 28, Section 292(b) is concerned, it is unconstitutional and in violation of both Article 3, Section 2 of the Constitution of the United States and of the due process clause of the Fifth Amendment to the Constitution of the United States.

Congress had no more jurisdiction to direct that crimes should be tried before a foreign trial judge, transported to Los Angeles, a foreign court reporter, a foreign clerk, transported to Los Angeles from Oregon, than if they had come from China or Europe, nor did the Chief Judge's order designating the Oregon judge to sit in Los Angeles to hold the District Court create the power given solely by the President of the United States and requiring the approval of the United States Senate before such judge is empowered to sit in the Southern District of California, Central Division.

The lack of authority on this specific point and question here raised is contrary to the power vested by the Constitution. Only two cases are referred to by the government in respect to the situation. Neither of them, we think, has the factual situation here, nor do we find that the questions which we have raised have been fully argued or presented in McDowell v. U.S. (1895), 159 US 596, 598, 40 L.ed. 271, nor in Lamar v. U.S., 241 US 103, 60 L.ed. 912.

We respectfully submit that the moving of an Oregon judge into the California area in a criminal case does violate Section 2, Article 3 of the Constitution of the United States, not clearly argued in either of the cases referred to; that it is not truly a trial within the state in which it occurred when a foreign judge sits; that such a proceeding violates due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. District Courts are solely the creation of statute and so are the judges who are appointed. It is quite evident that it never has been intended to appoint a judge, say, familiar only with Florida law or familiar only with New York law, and the methods there employed, to preside in other places.

We respectfully submit that by reason thereof, the whole proceedings were and are a nullity.

TRANSFER OF THIS CASE TO THE OREGON JUDGE

In connection with this point, we respectfully point out also that the government has not met our issue as to the manner in which the case was suddenly taken from the Presiding Judge of the Criminal Division of the District Court in Los Angeles and transferred to an Oregon judge on the morning of the proceedings in which the case was ordered and set for trial.

Local Rules as to the manner cases are to be assigned, when adopted by the judges, have the force and effect of law and the failure to follow this procedure because of the case, the nature of the publicity involved and the matters involved in the case, did not justify violating Local Rules.

A trial has always encompassed a court regularly constituted with a judge and its regular attaches, the clerk, the bailiff, the court reporter, and others. Its jurisdiction is territorial and extends only within the state and District where it is located. It is an assumption not granted either by the Constitution or any authority under the Constitution to extend this jurisdiction in respect to any part or member of that court, and we respectfully submit that a court with a foreign judge is illegally and unconstitutionally constituted and that its

acts are coram non judice.

SELECTION OF THE JURY - THE "ARIZONA SYSTEM"

The jury was improperly impanelled. Again, we submit that the errors of the Oregon trial judge put into effect the so-called "Arizona system" in a California court. Also, he limited the number of challenges in the case without regard to the fact that the statute in this case provides for the death penalty and therefore authorizes a larger number of challenges, to-wit: 20 peremptory challenges.

Appellee says we were not entitled to 20 challenges because the victim wasn't harmed, but the test is not whether the victim was harmed but what the statute authorizes us to have. It is presumed that the government would put on everything possible in its case and we were not bound by what the government proof ultimately showed in what we were entitled to have at the beginning of the trial.

Only a few cases are cited and none appear to have reached the United States Supreme Court from the California court. We submit that Congress has made the statute and its provisions determinative of the number of jurors and not what actually has happened in the case or what

the evidence may show as to whether there was bodily harm or not.

The trial judge, therefore, cannot at the outset of the case limit the selection of the jurors to what he thinks the evidence may show or what the government may say or what it is proposed will be produced. The statute itself, under the charge, carries the death penalty.

ERROR IN INSTRUCTIONS

The instruction of the trial judge which we respectfully contend invaded the province of the jury and destroyed the defense of the defendants as to the purpose of the trip, certainly took away from the jury the right to determine whether Sinatra, Jr. had acted freely and voluntarily and did not give the other side of the situation to the jury.

We respectfully submit that we did raise the question of the errors in the court's denials of the instructions.

DEFENDANT'S RIGHT TO CALL FRANK SINATRA, SR., AS A WITNESS

The government contends that we did not have the right to have Sinatra, Sr. returned as our witness. It will be remembered that he was only present in respect to the matters as to his testimony on behalf of the govern-

ment that the kidnaping was not a part of a publicity stunt or a hoax. (R.T. 1358-1361) It was agreed that he would be available as a witness for the defense and certainly the defendant was entitled to have Sinatra, Sr. present as his own witness in respect to all of the circumstances surrounding the securing of the money and matters relating to his participation in the whole matter. We were not bound or limited merely to questioning him on cross-examination and the court properly ordered a subpoena issued for Sinatra, Sr. In the meantime, however, he had taken a trip to Europe.

Defense counsel is not required to reveal his defense or outline the questions intended to be asked of Sinatra, Sr. and it was error for the court to have quashed the subpoena. The statement of the government is that there was "not one iota of direct evidence to this effect" as to the kidnaping being a prearranged publicity stunt or hoax. There was no admission by any of the parties, if that is what the government calls "direct" evidence. However, there were a large number of newspaper articles and pictures introduced showing the benefits which young Sinatra had obtained as the result of this affair. See defense exhibits in case.

Wide publicity was given to it. At least 50 newspapermen and television men were at the house when he

returned. Before returning he had hidden in the trunk of an automobile until he got to the house where he could confer with his father and with the publicity people and the attorney handling the Sinatra matters. The pictures on television and in the newspapers and magazine articles went far and wide and the court can take notice of the circumstantial evidence thus involved, which the defense certainly has a right to present and argue to the jury.

DEFENDANT WAS DENIED A PUBLIC TRIAL

In respect to the error excluding photographers and television cameras from the courtroom and adjacent corridors of the second floor, we are mindful of not only the decision in Estes v. Texas, 381 US 532, 14 L.ed.2d 543, but also of the Sheppard case, 34 Law Week 4451.

We believe that the constitutional guarantee of a public trial includes the right of photographers and television people as well as any other medium to see and hear and report electronically everything that occurred. We are mindful of the fact that in urging this result we are flying in the face of the recent decisions in an effort to harmonize the relationship between the press and the courts. Nevertheless, we think that insofar as full and fair recording is concerned, they should have the same rights as any other medium without which the defendant,

who in this case had rights, too, was denied a full public trial.

THE ALLEGED CONFESSION

Since the purported confessions of Irwin were made in the absence of Amsler and in the absence of any attorney for Irwin and the absence of any attorney for Amsler, we respectfully submit that they should have been excluded under the doctrines of Massiah v. U.S., 377 US 201, 12 L.ed.2d 356, Escobedo v. Illinois, 378 US 478, 12 L.ed.2d 356 and Mallory v. U.S., 354 US 449, 1 L.ed. 2d 1479, and cases there cited.

REFUSAL TO GIVE NAMES AND ADDRESSES OF JURORS AND WITNESSES

We again reassert that it is not what happened in the trial and that the alleged kidnaping victim was released unharmed but what the statute itself provides that governs the rights of the defendant.

Here, Title 18, Section 1202, the kidnaping statute, provides for a death penalty and is a capital offense. Under Title 18, U.S. Codes, defendant is entitled, under Section 3432, to the names and addresses of all the prospective jurors and witnesses at least three days prior to trial. These were refused to him in contravention of

the mandatory provision of the statute.

Furthermore, Brady v. Maryland, 373 US 83, 10 L.ed. 2d 215, provides that an accused is entitled to any names and addresses of any witnesses who may prove his innocence. The defendants sought and were denied the names of the roadblock officers who stopped the automobile in which Frank Sinatra, Jr. was riding and were refused this information prior to trial. Brady v. Maryland holds that such a refusal is a denial of due process of law, stating:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

SUFFICIENCY OF THE EVIDENCE

In connection with the sufficiency of the evidence to sustain the conviction as to appellant Amsler, the government states that it set forth the facts in connection with the statement of facts which shows the abundance of evidence to support the conviction of the appellant Amsler. We have challenged this sufficiency because of lack of proof of transportation and because of the consent of Sinatra, Jr.

The government has misconceived our position. We do not believe that the conspiracy count has been established removing the improper evidence secured in violation of the Fourth and Fifth Amendments and also in the light of Sinatra, Jr.'s admission and conduct on the whole trip. Counsel, in respect to Sinatra Jr.'s statement that he consented, overlooks the abundance of evidence not only of the admissions of Sinatra, Jr. as to his consent, but as to his whole conduct in this ride.

Furthermore, the government says that Sinatra, Jr. was not told anything about being the victim of a kidnaping until they reached the house on Mason Avenue in Canoga Park, whereas his roommate, within a few minutes after the alleged hold-up, had notified various people in the hotel that Sinatra, Jr. was kidnaped. A roadblock was set up and all kinds of officers from Nevada were present at the roadblock with guns, etc. The two are just inconsistent with "kidnaping". A single statement to one of the roadblock officers would have ended the whole matter. Sinatra, Jr. did not do so.

SPLITTING UP OF THE COUNTS

In connection with the kidnaping statute, Section 1201, Title 18, it is inconceivable that Congress intended it to be split up into a series of offenses. Title 18,

Section 1201 provides that whoever knowingly transports any person who has been unlawfully seized, consigned, inveigled, decoyed, kidnaped, abducted or carried away and held for ransom or reward or otherwise, is liable either to life or to death penalties.

In imposing such a penalty, Congress took into consideration that it would embrace not only transportation but would embrace all of the elements that are involved in a kidnaping case, to-wit: communication, which is an essential element of kidnaping for ransom, or communication by telephone or telegraph or mail, all methods of communcation. It also provided that all of these elements would make up the single crime of the violation of Section 1201 with the maximum penalty being either life imprisonment or death. It did not intend to have the crimes split up into conspiracy, under Section 371, and conspiracy under Section 1201.

Where there is a specific statute it covers the general subject matter. (Cohen v. U.S., 201 F.2d 386, and cases therein cited.)

The court, in interpreting 18 USC 1201, expanded the scope to cover not only for profit but for any other reason for which a person is seized or carried away and involved all the elements which necessarily go with such a kidnaping. (U.S. v. Healy, 376 US 75, 11 L.ed.2d 527; Gooch v.

U.S., 227 US 124, 80 L.ed. 522; Poindexter v. U.S., 139 F.2d 158; U.S. v. Bazzell, 187 F.2d 878, 883; U.S. v. Parker, 103 F.2d 857, 860; Wheatley v. U.S., 159 F.2d 599, 600)

We therefore respectfully disagree with the appellee's brief that the offenses of receiving, possessing and disposing of ransom money to be delivered for the release of kidnap victim, after he was kidnaped and transported, is not covered by the conspiracy provision in Title 18, Section 1201. In fact, the very essence of kidnaping for the purpose of ransom and the very language of the statute provides that any person who has been carried away and held for ransom, reward or otherwise, necessarily includes the proof that the person who is charged with holding received, possessed and disposed of ransom money for the release of a kidnap victim, which is an essential portion of the corpus delicti proving Section 1201 of Title 18.

Thus the statute, Section 1201, contrary to the contention of the government, does so provide.

THE INDICTMENT WAS DUPLICITOUS

The government apparently has missed our point in connection with the argument that the indictment, under Title 18, Section 1201, covered the entire charge.

Each and all of the acts charged against appellant, if true, were embraced within Section 1201. Therefore,

charging him under Section 371 of Title 18 was repetitious and therefore duplicitous. It matters not that Section 371 carried a lesser penalty. He was charged with violation of Section 1201 of Title 18, which carried a greater penalty, and was convicted of Section 1201 with the greater penalty. Therefore, the charge in respect to the greater penalty embraced everything and it was highly prejudicial to charge him with separate and duplicitous matters.

This is not a case of repeal by implication but a case of duplicitous charging of an indictment. It is the law of criminal pleading that when a statute includes all of the elements in the specific statute that it is to be followed and that the general statute, therefore, is not to be followed in respect thereto since the specific statute descends to particulars as it did in this case on the question of Section 1201 of Title 18.

DENIAL OF RIGHT TO TAPE PROCEEDINGS

We have argued the matter of taping the proceedings as a denial of the right to record all of the comments for the benefit of counsel so that preparation might be properly made for answer to the arguments that were made and to re-examine those thoughts. We think that counsel was unduly limited in this respect.

COURT'S ERROR IN ENTERING JURY ROOM

We have also presented in our opening brief the improper conduct of the judge in going into the jury room and addressing members of the jury without the presence or knowledge of defendants or their counsel and that this, alone, entitles the appellant to a reversal of the judgment below.

ILLEGAL SEARCHES AND SEIZURES

There was an illegal search and seizure of moneys when Irwin's car was searched in the absence of counsel and in the absence of appellant Amsler. The search was illegal and in violation of the Fourth Amendment to the Constitution of the United States. (Massiah v. U.S., 377 US 201, 12 L.ed.2d 356)

SEVERANCE

Appellant Amsler contended that he should have been granted a separate trial. Remembering the evidence of Irwin, who had made a purported confession outside of the presence of Amsler, and without the advice of benefit of any counsel, Amsler was highly prejudiced by the use of this confession which was played to the jury on a tape and read to the jury and testified to at length, all of which involved appellant Amsler and was secured in the

absence of appellant. Certainly it was an abuse of discretion under Rule 14, Federal Rules of Criminal Procedure.

People v. Aranda, 63 Cal.2d 518, cited by us in our opening brief, is a well reasoned case which holds that prejudice, under these circumstances, occurs. In that case the Supreme Court of California, speaking through Justice Traynor, said:

> "In Delli Paoli v. United States, 352 US 232 [77 S.Ct. 294, 1 L.ed.2d 278], the Supreme Court of the United States approved this rule in joint trials in the federal courts. In justifying its decision, the court said: 'It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.' (P. 242)
>
> "To some judges, however, the procedure cannot be justified. It 'results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence procedued against him.' (People v. Fisher,

249 N.Y. 419, 428 [164 N.E. 336, 339]@Lehman, J., dissenting]; see People v. Buckminster, 274 Ill. 435, 446-448 [113 N.E. 713, 715-716]; United States v. Delli Paoli (2d Cir.) 229 F.2d 319, 322 [Frank, J., dissenting].) It is a 'fiction' and a 'naive assumption' about the way juries can function. (See Krulewitch v. United States, 336 US 440, 453 [69 S.Ct. 716, 93 L.ed. 790] [Jackson, J., concurring]; People v. Chambers, 231 Cal.App.2d 23, 33 [31 Cal.Rptr. 551].) The rule calls upon the jury to perform 'a mental gymnastic which is beyond, not only their powers, but anybody's else.' (Nash v. United States (2d Cir.) 54 F.2d 1006, 1007; see Meltzer, Involuntary Confessions: The Allocation of Responsibility between Judge and Jury, 21 U.Chi. L.Rev. (1954) 317, 326.) Writing for the four dissenters in Delli Paoli v. United States, 352 US 232 [77 S.Ct. 294, 1 L.ed.2d 278], Justice Frankfurter stated: 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words

and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. ... The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (P. 247) To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' toward juries. We treat them ;at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) p. 105.)

"Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is ren-

dered harmless to the nonconfessing defendant by an instruction that it should not be considered against him. At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. (People v. Gonzales, 136 Cal. 666, 668-669 [69 P. 487]; see Greenwell v. United States (D.C. Cir.) 336 F.2d 962, 968, 969; People v. Donovan, 13 N.Y.2d 148, 151 []32 N.Y.S.2d 841, 193 N.E.2d 628]; People v. Waterman, 9 N.Y.2d 561, 567 [216 N.Y.S.2d 70, 175 N.E.2d 445]; compare People v. Rudish, 294 N.Y. 500 [62 N.E. 2d 77] with Malinski v. New York, 324 US 401,

> 410-412 [65 S.Ct. 781, 89 L.ed. 1029].) The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him (see People v. Parham, 60 Cal.2d 378, 385 [22 Cal.Rptr. 497, 384 P.2d 1001]) preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant."

The alleged confessions of Irwin were certainly highly prejudicial to the appellant Amsler and therefore resulted in a miscarriage of justice. One could not say that the jury did not consider all of these matters.

In the situation that Amsler was in, he necessarily was faced with the fact that the jury, consciously or subconsciously, would merge all of the evidence. Prejudice, therefore, resulted.

The Supreme Court of the United States in Jackson v. Denno, 378 US 368, 12 L.ed.2d 908, 1 ALR 3d 1205, held that a defendant was constitutionally entitled to have a trial judge or possibly a separate jury determine that his confession was voluntary before it was submitted to a trial jury for an assessment of its credibility. The court did not believe that a jury could separate the issue of the

voluntariness of an extrajudicial statement from the issue of its truth.

In Pointer v. Texas, 380 US 400, 13 L.ed.2d 923, the Supreme Court held that under the due process clause of the Fourteenth Amendment the Sixth Amendment guarantee of a defendant's right to be confronted by the witnesses against him included the right to cross-examine these witnesses. It found that when the prosecution in a criminal trial introduced the prior testimony of a witness who had not been subject to effective cross-examination the defendant's rights of confrontation were violated. This was approved also in Turner v. Louisiana, 379 US 466, 472.

In this case, the alleged confession of Irwin was taken in the absence of Amsler with no chance of cross-examining it.

In the Aranda case, supra, the court held that where the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: it can only permit a joint trial if all the parts of the extrajudicial statement implicating any codefendant can be effectively deleted without prejudice to the declarant; or it can grant a severance of the trials.

Neither was had in this case. We respectfully submit that the denial of the severance was highly prejudicial to the appellant Amsler.

THE MONEY

In connection with the matter of cross-examination, we were entitled to see what purported to be the money. The government did not have to destroy it before trial. It could have been as easily destroyed after trial and after defense counsel had a chance to see it and count it and see whether it was or was not, in fact, as purported to be and to investigate its source and purpose.

This we were denied.

ADOPTION OF POINTS

In respect to the matters raised by the appellant Irwin as to the misuse of the telephones and other points, we adopt the same on behalf of the appellant Amsler as our own and urge the Court to reverse on each of the grounds therein set forth.

CONCLUSION

For each and all of the errors set forth herein and in our opening brief, appellant Amsler respectfully prays for reversal of the judgments.

Respectfully submitted,

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